

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

KATHY JEAN HAMILTON,)
)
Plaintiff,) 03:11-cv-06063-HU
)
vs.) **FINDINGS AND**
) **RECOMMENDATION**
MICHAEL J. ASTRUE,)
Commissioner of Social Security,)
)
Defendant.)

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1 - FINDINGS AND RECOMMENDATIONS

1 HUBEL, J.,

2 Plaintiff Kathy Jean Hamilton ("Hamilton") seeks judicial
3 review of a final decision of the Commissioner of Social Security
4 ("Commissioner") denying her applications for disability insurance
5 benefits ("DIB") and supplemental security income benefits ("SSI")
6 under Titles II and XVI of the Social Security Act. Hamilton
7 advances one challenge to the Commissioner's decision, that is,
8 whether the Administrative Law Judge ("ALJ") sufficiently followed
9 this Court's mandate on remand. This court has jurisdiction to
10 review the Commissioner's decision pursuant to 42 U.S.C. § 405(g).
11 Following a careful review of the record, I conclude that the
12 Commissioner's decision should be **AFFIRMED**.

13 ***I. PROCEDURAL BACKGROUND***

14 Hamilton applied for disability and SSI benefits on August 26,
15 2005. (Tr. 13.) Both of Hamilton's applications alleged disability
16 beginning July 27, 2005. (Tr. 13.) The applications were denied
17 initially and upon reconsideration on February 6, 2006, and May 15,
18 2006, respectively. (Tr. 13, 34-42.) Hamilton appeared and
19 testified at a hearing held on April 9, 2008, before ALJ John
20 Madden, Jr. ("ALJ Madden"). (Tr. 24.) The ALJ issued a decision
21 denying Hamilton's claim for benefits on August 11, 2008. (Tr. 24.)
22 Hamilton timely requested review of the ALJ's decision, which was
23 denied by the Appeals Council on August 27, 2008. (Tr. 6.) As a
24 result, the ALJ's decision became the final decision of the
25 Commissioner that is subject to judicial review. (Tr. 6-8.)

26 Judge Clarke issued a Report and Recommendation on December
27 31, 2009, in which he recommended that the Commissioner's decision
28 be reversed and remanded for further proceedings. (Tr. 460-70.) On

1 February 5, 2010, Judge Panner adopted Judge Clarke's Report and
2 Recommendation and judgment was entered on February 8, 2010. (Tr.
3 471-73.)

4 On April 8, 2010, the Appeals Council issued a remand order,
5 finding Hamilton disabled as of age 55, but requiring further
6 proceedings to assess disability prior to February 6, 2009.¹ (Tr.
7 474-76.) On October 13, 2010, a second hearing was held before ALJ
8 Madden. (Tr. 612.) ALJ Madden issued his written decision on
9 October 27, 2010, finding Hamilton not disabled, as defined in the
10 Act, from July 27, 2005 through February 5, 2009. (Tr. 459.)
11 Hamilton "did not file exceptions to the ALJ's October 2010
12 decision and the Appeals Council did not otherwise assume
13 jurisdiction, making the ALJ's decision the Commissioner's final
14 decision, which is subject to judicial review." (Def.'s Br. at 6.)
15 On February 23, 2011, Hamilton timely filed the present action
16 challenging the Commissioner's decision. (Dkt. #1.)

17 **II. FACTUAL BACKGROUND**

18 The pertinent facts in this case are largely undisputed.
19 Hamilton was born in 1954 and was 51-54 years old during the
20 relevant time period at issue in this case, *i.e.*, July 27, 2005
21 (the alleged disability onset date) through February 5, 2009 (the
22 day before the Commissioner determined that Hamilton became
23 disabled). (Tr. 65, 476.) Hamilton obtained her General
24 Equivalency Diploma ("GED") after dropping out of high school in
25

26 ¹ Hamilton submitted additional applications for disability
27 on December 29, 2008, and based on information in the more recent
28 applications, the Appeals Council affirmed the State agency's
finding that Hamilton became disabled on February 6, 2009. (Tr.
475-76.)

the 12th grade. (Tr. 135.) She is 5' 11" tall and weighs in excess of 300 pounds. (Tr. 194, 569, 575, 629.) Hamilton alleges disability based upon a combination of physical and mental impairments, such as disorders of the back (discogenic and degenerative) and affective/mood disorders. (Tr. 30-31.)

Hamilton saw Allan Kirkendall ("Kirkendall"), Ph.D., for a psychological evaluation on January 17, 2006. (Tr. 135.) Kirkendall was asked to provide a clinical picture of Hamilton's day-to-day functioning, noting in particular any information pertaining to Hamilton's borderline personality disorder and/or major depressive disorder. (Tr. 135.) After conducting a clinical interview and administering a mental status exam, Kirkendall provided the following synopsis:

Hamilton presented as a depressed individual of average intelligence. **It appears that she is capable of understanding and remembering instructions. She would probably have some difficulty at this point sustaining concentration and attention due to her level of depression. Her depression appears to be intimately related to her lack of activity.** Ms. Hamilton was successful in her work at a call center over a period of seven years and then quit to help her daughter. **It is unfortunate that this woman has not returned to [her previous] line of work in which she had some success.** While she was persistent in today's interview, it is not clear that she is persistent on a consistent basis when at home. She is capable of engaging in appropriate social interactions although at this point she chooses to stay to herself finding it more comfortable. Her largest area of deficit appears to be her adaptive skills. At this point Ms. Hamilton indicated she feels overwhelmed by life and is having extreme difficulties simply tak[ing] care of her basic needs let alone making any significant changes in her life.

(Tr. 140) (emphasis added).²

² The fifth and sixth page of Kirkendall's assessment are in the wrong order in the administrative record. (See Tr. 139-40.)

1 On January 30, 2006, non-examining state agency psychiatric
2 consultant Robert Henry ("Henry"), Ph.D., submitted a Mental
3 Residual Functional Capacity Assessment, which described Hamilton
4 as "[m]oderately [l]imited" in three of twenty categories of mental
5 activity and "[n]ot [s]ignificantly [l]imited" in seventeen. (Tr.
6 174-76.) According to Henry,

7 **[Hamilton will have] [o]ccasional lapses in concentration**
8 **due to symptoms of depression. [She] [c]an carry out**
9 **simple, routine tasks on an independent basis. . . . [She**
10 **has] no problem with public contact via phone but no**
11 **face-to-face interaction with general public as [it] may**
12 **raise additional stressors and cause claimant increased**
13 **symptoms. Claimant should have occasional additional**
14 **help with changes in normal work procedures.**

15 (Tr. 176) (emphasis added).

16 ALJ Madden conducted the first hearing on April 9, 2008,
17 during which he received testimony from Vocational Expert ("VE")
18 Jeffrey Tittlefitz. (Tr. 376, 425.) The hypothetical posed to the
19 VE indicated that Hamilton "can carry out simple, routine tasks on
20 an independent basis. [No] face-to-face interaction with the
21 general public. . . . [Hamilton] should have occasional help with
22 changes in normal work procedures." (Tr. 427, 466.)

23 In his December 31, 2009 Report and Recommendation, Judge
24 Clarke noted that ALJ Madden's written decision "discussed Dr.
25 Kirkendall's report and **apparently** accepted his opinion regarding
26 [Hamilton]'s limitations as to sustaining concentration and
27 attention." (Tr. 466) (emphasis added). Because the hypothetical
28 posed to the VE only limited Hamilton to simple, routine tasks and
the ALJ did not explicitly discuss Hamilton's ability to
concentrate or pay attention during the hearing, Judge Clarke
determined that the hypothetical was deficient because it did not

1 encompass *all* of Hamilton's limitations. (Tr. 467-69.) Thus,
2 Judge Clarke recommended the matter "be reversed and remanded so
3 the ALJ and VE could consider the **effect** of Hamilton's limitation
4 in concentration and attention and determine whether jobs exist
5 that she could perform." (Tr. 469) (emphasis added).

6 On February 5, 2010, Judge Panner issued an Order, which
7 provided that:

8 Magistrate Judge Clarke's Report and Recommendation . . .
9 is adopted. The decision of the Commissioner is reversed
10 and remanded so that the Administrative Law Judge and the
11 Vocational Expert may consider the effect of Dr.
12 Kirkendall's opinion on [Hamilton]'s probable
difficulties in sustaining concentration, attention, and
persistence in the determination of whether [Hamilton] is
able to perform gainful employment in the national
economy.

13 (Tr. 473.)

14 Hamilton testified at the second hearing before ALJ Madden on
15 October 13, 2010. (Tr. 612.) ALJ Madden noted that "one of the
16 issues addressed in this remand was problems with concentrating and
17 paying attention"; therefore, he inquired as to whether Hamilton
18 had used a computer or "read or anything like that" since the April
19 2008 hearing. (Tr. 624.) Hamilton testified that she had not used
20 a computer since the last hearing, nor has she successfully been
21 able to read because she "lose[s] interest" and can't concentrate.
22 (Tr. 624.) Although Hamilton "used to be a reader," she was not
23 able to concentrate longer than five minutes and "wasn't [always]
24 comprehending what [she] was reading." (Tr. 624.)

25 Hamilton testified that, since the April 2008 hearing, she
26 sleeps more frequently during the day. (See Tr. 625) (indicating
27 that Hamilton sleeps about three times a day for twenty to sixty
28 minutes). Hamilton stated that she struggles with many day-to-day

1 activities, such as walking in the grocery store without an
2 electric cart. (Tr. 629-30.) As Hamilton explained, even after
3 walking a block she is "[h]urting." (Tr. 630.) Hamilton also
4 reported she has difficulty lifting objects due to back pain and
5 that she only showers about once a week. (Tr. 630-31.) Hamilton
6 attributes her personal hygiene issues to physical pain and
7 depression. (Tr. 631.)

8 The ALJ also received testimony from VE Kay Wise at the
9 October 13, 2010 hearing. (Tr. 633.) The ALJ began by noting that
10 Hamilton is physically limited to: occasionally lifting fifty
11 pounds and frequently lifting twenty-five; standing, walking, and
12 sitting about six hours in an eight-hour workday; unlimited pushing
13 and pulling; occasionally stooping, kneeling, crouching, and
14 crawling; frequent balancing and climbing; and no manipulative,
15 visual, communicative, or environmental limitations.³ (Tr. 636-
16 38.)

17 As to Hamilton's non-extortional limitations, the ALJ detailed
18 Henry and Kirkendall's assessments. (Tr. 636.) Beginning with
19 Henry, the ALJ stated:

20 **[D]ue to occasional lapses in concentration, due to**
21 **symptoms of depression, [Henry would limit Hamilton] to**
22 **carrying out simple, routine tasks on an independent**
23 **basis. No problems with public contact via phone, but no**
24 **face-to-face interaction with the general public, and**
25 **should have occasional additional help with changes in**
26 **normal work procedures[.]**

27 ³ These limitations appear to be taken from Department of
28 Disability Services physician J. Scott Pritchard's January 27, 2006
Physical Residual Functional Capacity Assessment. (Tr. 148-55.)

(Tr. 636.)⁴ The ALJ defined "occasional additional help" as needing a "little additional explanation or maybe a little extra supervision." (Tr. 637.) Taking into consideration Hamilton's age and education, and after ruling out Hamilton's past relevant work, the ALJ asked the VE if there were "other occupations [she] might consider feasible[.]" (Tr. 638.) The VE stated that the jobs of hand packager and linen room attendant existed in significant numbers in the national economy. (Tr. 638-39.)

Next, the ALJ set forth the particulars of Kirkendall's report, stating:

[L]et me add this in . . . Dr. Kirkindol [sic] found . . . [Hamilton] presented as a depressed individual [of average intelligence], . . . [who is] capable of understanding and remembering instructions. . . . [Kirkendall] found . . . she would probably have some difficulty at this point sustaining concentration and attention due to her level of depression[.] . . . He also found that while [Hamilton] was persistent in the interview, it was not clear that she was persistent on a . . . consistent basis when at home. He diagnosed [Hamilton] with adjustment disorder, and borderline personality disorder, and assessed a GAF of 50, indicating serious symptoms. . . . [According to Kirkendall, Hamilton] is capable of engaging in appropriate social interactions, although at this point, she chooses to stay by . . . herself finding it more comfortable. Her largest area of deficit appears to be her adaptive skills. . . . At this point, Miss Hamilton indicated that she feels overwhelmed by life, and is having extreme difficulty simply taking care of her basic

⁴ In the proceeding before Judge Clarke, the Commissioner argued that Kirkendall's findings agreed with those of Henry, who concluded in his Mental Residual Functional Capacity Assessment that, "despite '[o]ccasional lapses in concentration due to symptoms of depression,' [Hamilton] could still 'carry out simple, routine tasks on an independent basis.'" (Tr. 469.) As Judge Clarke pointed out, that was not the *precise* language used by Henry. (Tr. 469.) However, he also noted that this was not particularly relevant because "this is not Dr. Kirkendall's opinion," *i.e.*, the physician whose opinion appeared to receive a cursory review. (See Tr. 469.)

needs, let alone making any significant changes in her life.

(Tr. 639-40) (emphasis added).⁵

After noting that the VE provided examples of applicable jobs based on the ALJ's interpretation of the medical evidence, the ALJ provided an alternate interpretation to the VE:

Q Okay. So, if I interpret that basically to say that, if she has difficulty sustaining attention and concentration to the level that she couldn't even do these unskilled occupations.

A Right.

Q [T]hat would -- I mean, that would preclude work?

A Yes, it would.

Q Alright.

A If she wouldn't have consistency as they've noted . . . [with respect to] concentration and attention, it would affect all work.

Q Okay.

(Tr. 640-41.)⁶ ALJ Madden then stated, "I think that is the best I can do with that [counsel]. I'm looking at what the court said and everything. . . . [T]here's nothing really clear from either [Judge Panner's Order or Judge Clarke's Report and Recommendation],

⁵ The ALJ's summarization of Kirkendall's opinion was based on Kirkendall's January 17, 2006 psychological evaluation and Judge Clarke's December 31, 2009 Report and Recommendation. (See Tr. 135, 140, 466, 639-40.)

⁶ ALJ Madden interpreted the medical evidence to suggest that Hamilton should be limited to "simple, repetitive activities." (Tr. 640-41.) The VE indicated that a hypothetical individual, who is limited to carrying out "simple, routine tasks on an independent basis" could perform the jobs of hand packager and linen room attendant. According to the Dictionary of Occupational Titles ("DOT"), these jobs involve performing repetitive work. *Koontz v. Astrue*, Civ. No. 08-2153-LAB (WVG), 2010 WL 3339388, at *5 (S.D. Cal. July 26, 2010).

1 but . . . somewhere along the line there has to be some
2 interpretation of it." (Tr. 642.)

3 Hamilton's counsel then asked the VE to consider a
4 hypothetical individual, who experienced lapses of concentration
5 five times a week for fifteen minutes in duration, at unpredictable
6 intervals. (Tr. 644-45.) The VE stated that this "would
7 definitely be a problem" because it would impact her productivity,
8 work quality, and ability to adapt to changes. (Tr. 645-46.)

9 Hamilton's counsel inquired whether this hypothetical
10 individual would be allowed to "sleep during the course of a normal
11 shift[.]" (Tr. 646.) The VE stated, "[s]eriously, Counsel, they
12 can't sleep on a job outside of a break or a lunch hour. So, if
13 a . . . supervisor found that . . . [t]here would be a very serious
14 reprimand or a termination." (Tr. 646.) Hamilton's counsel also
15 asked whether this hypothetical individual would be allowed to
16 elevate her legs in any of the jobs indicated, at unpredictable
17 intervals. (Tr. 646.) The VE responded, "[n]ot above the waist-
18 level. . . . [T]hey would be found physically not suited to sustain
19 [employment]." (Tr. 646-47.)

20 After noting that Henry opined that Hamilton had moderate
21 limitations in maintaining attention and concentration, Hamilton's
22 counsel asked the VE to consider a hypothetical individual that
23 suffers moderate limitations four days a week and marked
24 limitations once a week. (Tr. 647-48.) The VE stated, "[m]arked
25 level precludes a productive workday. So, if . . . this is
26 happening one day a week . . . [t]hat would certainly lead to an
27 individual being unable to hold their job." (Tr. 648-49.)
28 Hamilton's counsel then altered the hypothetical, stating, "[w]hat

1 if there was only a 15 or 20 percent reduction in productivity one
 2 or two days a week, and the rest of the week the person was able to
 3 sustain productivity? Would that impact her ability to keep . . .
 4 the jobs identified?" (Tr. 649.) The VE stated: "I feel it would,
 5 yes because 20 percent reduces it down, and . . . they're losing
 6 some valuable hours during the week of productive work." (Tr.
 7 649.)

8 **III. DISABILITY DETERMINATION AND THE BURDEN OF PROOF**

9 **A. Legal Standards**

10 A claimant is disabled if he or she is unable to "engage in
 11 any substantial gainful activity by reason of any medically
 12 determinable physical or mental impairment which . . . has lasted
 13 or can be expected to last for a continuous period of not less than
 14 12 months[.]" 42 U.S.C. § 423(d)(1)(A).

15 "Social Security Regulations set out a five-step sequential
 16 process for determining whether an applicant is disabled within the
 17 meaning of the Social Security Act." *Keyser v. Comm'r Soc. Sec.*,
 18 648 F.3d 721, 724 (9th Cir. 2011) (citing 20 C.F.R. § 404.1520)).
 19 The *Keyser* court described the five-step process as follows:

20 (1) Is the claimant presently working in a substantially
 21 gainful activity? (2) Is the claimant's impairment
 22 severe? (3) Does the impairment meet or equal one of a
 23 list of specific impairments described in the regula-
 24 tions? (4) Is the claimant able to perform any work that
 25 he or she has done in the past? and (5) Are there
 26 significant numbers of jobs in the national economy that
 27 the claimant can perform?

28 *Keyser*, 648 F.3d at 724-25 (citing *Tackett v. Apfel*, 180 F.3d 1094,
 1098-99 (9th Cir. 1999)). The claimant bears the burden of proof
 for the first four steps in the process. If the claimant fails to
 meet the burden at any of those four steps, then the claimant is

1 not disabled. *Bustamante v Massanari*, 262 F.3d 949, 953-54 (9th
2 Cir. 2001); see *Bowen v. Yuckert*, 482 U.S. 137, 140-41, 107 S. Ct.
3 2287, 2291, 96 L. Ed. 2d 119 (1987); 20 C.F.R. §§ 404.1520(g) and
4 416.920(g) (setting forth general standards for evaluating
5 disability), 404.1566 and 416.966 (describing "work which exists in
6 the national economy"), and 416.960(c) (discussing how a claimant's
7 vocational background figures into the disability determination).

8 The Commissioner bears the burden of proof at step five of the
9 process, where the Commissioner must show the claimant can perform
10 other work that exists in significant numbers in the national
11 economy, "taking into consideration the claimant's residual
12 functional capacity, age, education, and work experience." *Tackett*
13 *v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the Commissioner
14 fails meet this burden, then the claimant is disabled, but if the
15 Commissioner proves the claimant is able to perform other work
16 which exists in the national economy, then the claimant is not
17 disabled. *Bustamante*, 262 F.3d at 954 (citing 20 C.F.R.
18 §§ 404.1520(f), 416.920(f)); *Tackett*, 180 F.3d at 1098-99).

19 The ALJ determines the credibility of the medical testimony
20 and also resolves any conflicts in the evidence. *Batson v. Comm'r*
21 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004) (citing
22 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)).
23 Ordinarily, the ALJ must give greater weight to the opinions of
24 treating physicians, but the ALJ may disregard treating physicians'
25 opinions where they are "conclusory, brief, and unsupported by the
26 record as a whole, . . . or by objective medical findings." *Id.*
27 (citing *Matney, supra*; *Tonapetyan v. Halter*, 242 F.3d 1144, 1149
28 (9th Cir. 2001)). "[T]he Commissioner must provide clear and

1 convincing reasons for rejecting the uncontradicted opinion of an
 2 examining physician. . . . [And,] the opinion of an examining
 3 doctor, even if contradicted by another doctor, can only be
 4 rejected for specific and legitimate reasons that are supported by
 5 substantial evidence in the record." *Lester v. Chater*, 81 F.3d
 6 821, 830-31 (9th Cir. 1995) (citations and internal quotation marks
 7 omitted).

8 The ALJ also determines the credibility of the claimant's
 9 testimony regarding his or her symptoms:

10 In deciding whether to admit a claimant's subjective
 11 symptom testimony, the ALJ must engage in a two-step
 12 analysis. *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
 13 1996). Under the first step prescribed by *Smolen*, . . .
 14 the claimant must produce objective medical evidence of
 15 underlying "impairment," and must show that the
 16 impairment, or a combination of impairments, "could
 17 reasonably be expected to produce pain or other
 18 symptoms." *Id.* at 1281-82. If this . . . test is satis-
 19 fied, and if the ALJ's credibility analysis of the
 20 claimant's testimony shows no malingering, then the ALJ
 21 may reject the claimant's testimony about severity of
 22 symptoms [only] with "specific findings stating clear and
 23 convincing reasons for doing so." *Id.* at 1284.

24 *Batson*, 359 F.3d at 1196.

25 **B. The ALJ's Decision**

26 At the first step of the five-step sequential evaluation
 27 process, the ALJ found that Hamilton had not engaged in substantial
 28 gainful activity since July 27, 2005, the alleged disability onset
 date. (Tr. 446.) At the second step, the ALJ found that Hamilton
 had the following severe impairments: degenerative disc disease of
 the lumbar spine; degenerative joint disease of the left knee;
 adjustment disorder; borderline personality disorder; and obesity.
 (Tr. 446.) At the third step, the ALJ found that Hamilton's
 combination of impairments were not the equivalent of any of the

1 impairments enumerated in 20 C.F.R. § 404, subpt P, app. 1. (Tr.
2 448.) The ALJ therefore assessed Hamilton as having the residual
3 functional capacity ("RFC") to

4 perform medium work . . . with lifting, carrying, pushing
5 and pulling 50 pounds occasionally, 25 pounds frequently,
6 standing and walking about six hours of an eight hour
7 workday and sitting about six hours of an eight hour
8 workday. She can occasionally stoop, kneel, crouch, and
9 crawl and frequently climb and balance. Due to occasional
10 lapses in concentration due to depression, the claimant
11 is limited to simple, routine tasks on an independent
12 basis. She can have contact with the public via telephone
13 but is to have no face-to-face interaction with the
14 public. The claimant should have occasional additional
15 help with changes in work procedures.

16 (Tr. 449.) At the fourth step of the five-step process, the ALJ
17 found that Hamilton is unable to perform any past relevant work.

18 (Tr. 457.) At the fifth step, the ALJ found in light of Hamilton's
19 age, education, work experience, and RFC that there were jobs
20 existing in significant numbers in the national and local economy
21 that she could perform, including a hand packager and linen room
22 attendant. (Tr. 458.) Based on the finding that Hamilton could
23 perform jobs existing in significant numbers in the national
24 economy, the ALJ concluded that she was not disabled as defined in
25 the Act from July 27, 2005, through February 5, 2009. (Tr. 459.)

26 **IV. STANDARD OF REVIEW**

27 The court may set aside a denial of benefits only if the
28 Commissioner's findings are "'not supported by substantial evidence
or [are] based on legal error.'" *Bray v. Comm'r Soc. Sec. Admin.*,
554 F.3d 1219, 1222 (9th Cir. 2009) (quoting *Robbins v. Soc. Sec.*
Admin., 466 F.3d 880, 882 (9th Cir. 2006)); accord *Black v. Comm'r*,
433 Fed. Appx. 614, 615 (9th Cir. 2011). Substantial evidence is
"'more than a mere scintilla but less than a preponderance; it is

1 such relevant evidence as a reasonable mind might accept as
 2 adequate to support a conclusion.'" *Id.* (quoting *Andrews v.*
 3 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).

4 The court "cannot affirm the Commissioner's decision 'simply
 5 by isolating a specific quantum of supporting evidence.'" *Holohan*
 6 *v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (quoting *Tackett*
 7 *v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1998)). Instead, the court
 8 must consider the entire record, weighing both the evidence that
 9 supports the Commissioner's conclusions, and the evidence that
 10 detracts from those conclusions. *Id.* However, if the evidence as
 11 a whole can support more than one rational interpretation, the
 12 ALJ's decision must be upheld; the court may not substitute its
 13 judgment for the ALJ's. *Bray*, 554 F.3d at 1222 (citing *Massachi v.*
 14 *Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007)).

15 **V. DISCUSSION**

16 The principal issue in this appeal is whether the ALJ failed
 17 to comply with this Court's remand order by failing to account for
 18 the concentration and attention limitations identified by
 19 Kirkendall. (See Pl.'s Opening Br. at 2, 9-10; Def.'s Br. at 2.)
 20 Although an ALJ must comply with a district court's remand order,
 21 *Sullivan v. Hudson*, 490 U.S. 877, 886, 109 S. Ct. 2248, 104 L. Ed.
 22 2d 941 (1989), any alleged failure is subject to harmless error
 23 analysis. *Blanquet v. Astrue*, No. EDCV 10-0181-JEM, 2011 WL
 24 283184, at *4 (C.D. Cal. Jan. 24, 2011).

25 Judge Panner's February 5, 2010 Order indicates that the ALJ
 26 was to "consider the effect" of Kirkendall's opinion on Hamilton's
 27 "probable difficulties in sustaining concentration, attention, and
 28 persistence in the determination of whether [Hamilton] is able to

1 perform gainful employment in the national economy." (Tr. 473)
2 (emphasis added).

3 Hamilton argues that the ALJ improperly reassessed Henry and
4 Kirkendall's opinion on remand. According to Hamilton, "[n]othing
5 in the Report and Recommendation or the final Court Order
6 authorized the ALJ, on remand, to reassess or reject the opinions
7 of Dr. Kirkendall or Dr. Henry." (Pl.'s Opening Br. at 10.)
8 Essentially Hamilton argues that the remand order was not properly
9 followed. I am not persuaded by this argument.

10 In his Report and Recommendation, Judge Clarke stated that ALJ
11 Madden "apparently accepted" Kirkendall's opinion regarding
12 Hamilton's limitations as to sustaining concentration and attention
13 based on the following portion of the August 11, 2008 written
14 decision: "The claimant was reported as experiencing some
15 disturbance in her ability to sustain concentration and attention
16 due to her depression; the [RFC] set forth above limits her to
17 simple routine tasks to accommodate her deficits in these areas."
18 (Tr. 466.) Nowhere within the August 11, 2008 decision, however,
19 does the ALJ indicate the weight he assigned to Kirkendall's
20 assessment. (Tr. 13-24.) As a result, Judge Panner ordered the
21 ALJ to "consider the effect" of Kirkendall's opinion in arriving at
22 Hamilton's RFC. It was not clear that this had been done in the
23 2008 hearing and decision.

24 The Commissioner contends that ALJ Madden's compliance with
25 the remand order was sufficient in this case. In support of his
26 position, the Commissioner directs the court to the Ninth Circuit's
27 decisions in *Thomas v. Barnhart*, 278 F.3d 947 (9th Cir. 2002) and
28 *Stubbs-Danielson v. Astrue*, 539 F.3d 1169 (9th Cir. 2008). I agree

1 with the Commissioner that *Thomas* and *Stubbs-Danielson* provide
2 meaningful guidance.

3 In *Thomas*, the claimant argued that "the ALJ's hypothetical
4 was inadequate because the ALJ omitted a finding checked on his
5 Psychiatric Review Technique Form ("PRTF") that [the claimant] had
6 deficiencies of concentration, persistence or pace, often resulting
7 in a failure to complete tasks in a timely manner." *Thomas*, 278
8 F.3d at 956. During the claimant's hearing, the ALJ instructed the
9 VE to credit a physician's opinion who, just before the VE's
10 testimony, testified that the claimant had "deficiency to
11 concentration, persistence and pace often." *Id.* Because the VE
12 was present for the physician's testimony and was provided exhibits
13 which included similar findings, the Ninth Circuit held the
14 "hypothetical to the VE . . . adequately incorporated the
15 functional limitations of concentration, persistence and pace." *Id.*

16 In *Stubbs-Danielson*, the ALJ concluded the claimant had the
17 RFC "to perform simple, routine, repetitive sedentary work,
18 requiring no further interaction with the public." *Stubbs-*
19 *Danielson*, 539 F.3d at 1173. The claimant argued that the ALJ's
20 "RFC finding did not capture the deficiency in pace and other
21 mental limitations identified by Dr. Bryce McCollum and Dr. Bruce
22 Eather." *Id.* The Ninth Circuit disagreed. *Id.* McCollum's 2002
23 Intellectual Assessment indicated that the claimant had a "slow
24 pace, both with thinking and her actions" and his 2005 Mental
25 Residual Functional Capacity Assessment ("MRFCA") identified the
26 claimant as "moderately limited" in several mental functioning
27 areas, including the ability "to perform at a consistent pace
28 without an unreasonable number and length of rest periods." *Id.*

1 Although McCollum did not assess whether the claimant could perform
2 unskilled work on a sustained basis, Eather did. *Id.* Eather's
3 report indicated that the claimant retained the ability to "carry
4 out simple tasks as evidenced by her ability to do housework,
5 shopping, work on hobbies, cooking and reading." *Id.* As the
6 *Stubbs-Danielson* court recognized,

7 [t]he ALJ translated [the claimant]'s condition,
8 including the pace and mental limitations, into the only
9 concrete restrictions available to him- Dr. Eather's
10 recommended restriction to 'simple tasks.' This does not,
11 as [the claimant] contends, constitute a rejection of Dr.
12 McCollum's opinion. Dr. Eather's assessment is consistent
with Dr. McCollum's 2005 MRFC, which found [claimant] is
'not significantly limited' in her ability to 'carry out
very short simple instruction,' 'maintain concentration
for extended periods,' and 'sustain an ordinary routine
without special supervision.'

13 *Id.* at 1174.

14 In so holding, *Stubbs-Danielson* stated, "an ALJ's assessment
15 of a claimant adequately captures restrictions related to
16 concentration, persistence, or pace where the assessment is
17 consistent with restrictions identified in the medical testimony."
18 *Id.* ("where state psychologist both identified claimant as having
19 deficiencies of concentration, persistence or pace and pronounced
20 claimant possessed the ability to 'sustain sufficient concentration
21 and attention to perform at least simple, repetitive, and routine
22 cognitive activity without severe restriction of function,' ALJ's
23 hypothetical including ability to perform 'simple, routine,
24 repetitive tasks' adequately captured claimant's deficiencies in
25 concentration persistence or pace" (citing *Howard v. Massanari*, 255
26 F.3d 577, 582 (8th Cir. 2001))).

27 It is well settled that the hypothetical an ALJ poses to a VE,
28 which derives from the RFC, "must set out all the limitations and

1 restrictions of the particular claimant." *Embrey v. Bowen*, 849
2 F.2d 418, 422 (9th Cir 1988). "While the ALJ may pose to the
3 expert a range of hypothetical questions, based on alternate
4 interpretations of the evidence, substantial evidence must support
5 the hypothetical which ultimately serves as the basis for the ALJ's
6 determination." *Moua v. Astrue*, CIV S-07-2024 GGH, 2009 WL 997104,
7 at *11 (E.D. Cal. Apr. 14, 2009).

8 Upon review, I cannot say ALJ Madden ignored evidence of
9 Hamilton's impairments when he fashioned her RFC because it appears
10 to be consistent with Kirkendall and Henry's reports and seems to
11 adequately capture the tasks Hamilton can do despite her
12 concentration, persistence, or pace restrictions. Likewise, ALJ's
13 Madden's hypothetical, which was derived from the RFC, properly
14 encompasses Hamilton's limitations as the ALJ found them. It is
15 the ALJ's obligation to determine a claimant's RFC (e.g., a summary
16 of what the claimant is capable of doing) and he may incorporate
17 the RFC into the VE hypothetical. *Valentine v. Comm'r Soc. Sec.*
18 *Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). ALJ Madden did exactly
19 that. He considered Kirkendall's and Henry's opinion in
20 formulating the RFC and discussed those opinions with the VE. (See
21 Tr. 640-41) (indicating that the ALJ interpreted Kirkendall's
22 report to suggest that Hamilton should be limited to simple,
23 repetitive tasks and noting that the VE provided examples of jobs
24 suitable for an individual with these deficiencies, i.e., the VE's
25 response to the ALJ's hypothetical which was predicated on Henry's
26 report). Although some of the hypotheticals posed could have been
27 more artfully formulated, substantial evidence supports the
28

1 hypothetical which ultimately served as the basis for ALJ Madden's
2 decision.

3 *Sabin v. Astrue*, 337 Fed. Appx. 617 (9th Cir. 2009), is
4 instructive here. In *Sabin*, the ALJ determined the "end result" of
5 the claimant's "moderate difficulties as to concentration,
6 persistence, or pace was that she could do simple and repetitive
7 tasks on a consistent basis." *Id.* at 621. On appeal, the claimant
8 argued the ALJ found she had moderate difficulties in
9 concentration, persistence, or pace yet failed to account for these
10 in the RFC finding or VE hypothetical. *Id.* at 620. *Sabin* found
11 this argument unpersuasive. *Id.* at 620 ("holding 'capable of doing
12 simple, repetitive, routine tasks' adequately captured such
13 deficiencies" (quoting *Howard*, 255 F.3d at 582)).⁷ In support of
14 this conclusion, *Sabin* noted, among other things, that the RFC was
15 consistent with several physician's reports and, although the
16 claimant could *not* complete serial 3's, "she could complete serial
17 1's; spell 'world' backwards; follow a three-step command; and do
18 her own cooking, cleaning, laundry, shopping, and bills." *Sabin*,
19 337 Fed. Appx. at 621.

20 Similarly, in this case, as in *Sabin*, the ALJ adequately
21 accounted for Hamilton's limitations in the RFC finding and VE
22 hypothetical. ALJ Madden determined the end result of Hamilton's
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26 ⁷ *Sabin* also distinguished contrary Eight Circuit precedent.
27 See *Sabin*, 337 Fed. Appx. at 621 ("holding 'simple jobs' was
28 insufficient to cover concentration, persistence, or pace" (quoting
Newton v. Chater, 92 F.3d 688, 695 (8th Cir. 1996))).

1 concentration and/or attention difficulties was that she could do
2 simple, routine tasks on an independent basis.⁸

3 The medical evidence supports this conclusion. Kirkendall's
4 2006 report indicates that, although Hamilton "would *probably* have
5 some difficulty at this point in sustaining concentration and
6 attention due to her level of depression," which appears
7 "intimately related to her lack of activity," she is "capable of
8 understanding and remembering instructions." (Tr. 140) (emphasis
9 added). Kirkendall's 2006 report further provides that Hamilton's
10 "immediate recall and short-term memory appeared to be generally
11 intact," despite complaints of memory problems; Hamilton "completed
12 Serial 3's with one unrecognized math error"; she was able to
13 remember instructions and "spell the word 'WORLD' forwards"; she is
14 "capable of reading the daily paper"; and she "reads at night in
15 order to go to sleep." (Tr. 135, 137.)

16 Henry's 2006 PRTF indicates Hamilton has "[m]ild"
17 "[d]ifficulties in [m]aintaining [c]oncentration, [p]ersistence, or
18 [p]ace" and his 2006 MRFCA identified Hamilton as "[n]ot
19 [s]ignificantly [l]imited" in several mental functioning areas,
20

21 ⁸ Again, the VE indicated that a hypothetical individual, who
22 is limited to carrying out "simple, routine tasks on an independent
23 basis" could perform the jobs of hand packager and linen room
attendant. According to the DOT, these jobs involve performing
repetitive work. *Koontz*, 2010 WL 3339388, at *5.

24 The claimant in *Koontz* had "mild difficulties with regard to
concentration, persistence and pace." *Id.* at *8. *Koontz* upheld the
25 ALJ's conclusion that the claimant "could perform simple repetitive
task such as the tasks required of a hand packager and a linen room
26 attendant," *id.* at *5, and noted that the VE testified that, even
if the claimant's symptoms of Tourette's Syndrome were
27 *uncontrolled*, he could still be a hand packager or linen room
attendant. *Id.* at *9.

1 including the ability to: "remember locations and work-like
 2 procedures"; "understand and remember very short and simple
 3 instructions"; "understand and remember detailed instructions";
 4 "carry out very short and simple instructions"; "carry out detailed
 5 instructions"; and "make simple work-related decisions." (Tr. 170,
 6 174.) Although Henry found Hamilton's "ability to maintain
 7 attention and concentration for *extended periods*" was "[m]oderately
 8 [l]imited," he made clear that Hamilton "[c]an carry out simple,
 9 routine tasks on an independent basis." (Tr. 174, 176.)

10 Moreover, as in *Thomas*, the hypothetical to the VE adequately
 11 incorporated Hamilton's limitations in maintaining attention and
 12 concentration. See *Thomas*, 278 F.3d at 956 ("holding that an ALJ's
 13 hypothetical referring to a limited, unambiguous medical record
 14 appropriately included the claimant's limitations" (citing *Torres*
 15 *v. Sec'y of Health & Human Servs.*, 870 F.2d 742, 745-46 (1st Cir.
 16 1989))). In formulating the hypothetical which ultimately served
 17 as the basis for the October 27, 2010 decision, ALJ Madden detailed
 18 Henry's 2006 PRTF which is markedly similar to Kirkendall's 2006
 19 report.⁹ Considering Kirkendall did not assess whether Hamilton

21 ⁹ (Compare Tr. 176) ("Occasional lapses in concentration due
 22 to symptoms of depression. Can carry out simple, routine tasks on
 23 an independent basis") (with Tr. 140) ("[Hamilton] is capable of
 24 understanding and remembering instructions. She would *probably*
 have some difficulty sustaining concentration and attention due to
 her level of depression.")

25 By contrast, in formulating the hypothetical which ultimately
 26 served as the basis for the ALJ's August 11, 2008 decision, ALJ
 27 Madden did not explicitly discuss Henry or Kirkendall's opinion,
 28 nor did he make any specific reference to Hamilton's ability to
 maintain attention and concentration. (Tr. 16, 22-23, 425-30.)
 Instead, ALJ Madden and the VE discussed a medical opinion letter
 (Ex. 17F) completed by family nurse practitioner Eileen Tabert on
 March 26, 2008, and a Physical Residual Functional Capacity

1 could perform "simple, routine tasks on an independent basis," and
2 Henry did, it seems to me that ALJ Madden translated Hamilton's
3 condition into the only concrete restriction available to him. *Cf.*
4 *Stubbs-Danielson*, 539 F.3d at 1174 ("The ALJ translated Stubbs-
5 Danielson's condition, including the pace and mental limitations,
6 into the only concrete restrictions available to him- Dr. Eather's
7 recommended restriction to 'simple tasks.'")

8 The Eight Circuit's oft-cited decision in *Howard* is directly
9 on point. In *Howard*, the ALJ found the claimant "often experienced
10 deficiencies of concentration, persistence or pace" and "asked the
11 [VE] to assume that [the claimant] would be capable of performing
12 simple, routine, repetitive tasks." *Howard*, 255 F.3d at 581. The
13 Eight Circuit determined this was not reversible error. *Id.*
14 Notably, the court relied on a state psychological consultant's
15 findings which concluded that the claimant, despite the
16 aforementioned deficiencies, retained the ability "to perform at
17 least simple, repetitive, and routine cognitive activity without
18 severe restriction of function." *Id.* at 582. The medical evidence
19 provided by Henry in the present case reflects the same conclusion.

20 In short, the ALJ did not fail to comply with this Court's
21 remand order, or alternatively, if he did, the error was harmless.
22 See *Fuller v. Astrue*, Civ. No. 09-1614-PHX-FJM, 2010 WL 4573547, at
23

24 Assessment and Physical Summary (Ex. 4F) completed by Department of
25 Disability Services physicians J. Scott Pritchard and Neal Berner
26 on January 27, 2006, and May 8, 2006, respectively. (Tr. 3-4, 148-
27 56, 358-59, 425-31.) The medical evidence provided by Tabert,
28 Pritchard, and Berner does not appear to adequately address
Hamilton's ability maintain concentration and attention. (Tr. 148-
56, 358-59.)

1 *6 (D. Ariz. Nov. 5, 2010) (indicating that an error is harmless
2 when the correction of that error would not alter the result).

3 **VI. CONCLUSION**

4 Following a careful review of the record, I conclude that the
5 Commissioner's decision should be **AFFIRMED**.

6 **VII. SCHEDULING ORDER**

7 The Findings and Recommendation will be referred to a district
8 judge. Objections, if any, are due **July 3, 2012**. If no objections
9 are filed, then the Findings and Recommendation will go under
10 advisement on that date. If objections are filed, then a response
11 is due **July 20, 2012**. When the response is due or filed, whichever
12 date is earlier, the Findings and Recommendation will go under
13 advisement.

14 Dated this 15th day of June, 2012.

15 /s/ Dennis J. Hubel

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17 DENNIS J. HUBEL
18 Unites States Magistrate Judge
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